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In the Supreme Court of the United States

October Term, 1987

SESSIONS TANK LINERS, INC., d/b/a SOUTHWEST TANK LINERS, INC.,

Petitioner and Cross-Respondent,

v.

JOOR MANUFACTURING, INC.,

Respondent and Cross-Petitioner.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RESPONSE TO CROSS-PETITION

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PETITIONER'S REPLY TO CROSS-PETITION

A. Introduction

On October 26, 1987, petitioner Sessions Tank Liners, Inc., d/b/a Southwest Tank Liners, Inc. ("Southwest"), filed its petition for writ of certiorari. On November 27, 1987, Joor Manufacturing, Inc. ("Joor"), filed a cross-petition for writ of certiorari. On February 26, 1988, the Clerk of this Court invited Southwest to respond to Joor's cross-petition.

Both parties agree that important issues of first impression are raised by the Ninth Circuit's decision below and the related decision in *Indian Head, Inc. v. Allied Tube & Conduit Corp.*, 817 F.2d 938 (2d Cir.), *cert. granted,* ___ U.S. ___, 108 S. Ct. 65 (1987). However, it should be carefully noted that Southwest

and Joor disagree as to how the central issue should be framed.

Southwest believes that petitioning of a *private* standards-setting organization, such as the Western Fire Chiefs Association ("WFCA"), is not protected by *Noerr-Pennington*. Although its recommendations may ultimately be adopted by governmental bodies, the WFCA itself is *not* a public body. The WFCA's decision to adopt a regulation or rule does not make it law. There are no public policy justifications for extending *Noerr-Pennington* immunity to petitioning of private standards-setting organizations. On the contrary, there are many compelling reasons for not extending the *Noerr-Pennington* doctrine to protect Joor's petitioning of the WFCA.

In its cross-petition Joor argues that application of *Noerr-Pennington* immunity hinges on whether the petitioning was consistent with the WFCA's rules. If it was, Joor suggests, the integrity of the WFCA's decision-making process is validated and the *Noerr-Pennington* doctrine should be applied. This argument is flawed. As petitioner has already pointed out, Joor in fact did manipulate the Article 79 Subcommittee process to Southwest's disadvantage. The "subversion" of procedural fairness and associational rules may have been more blatant in *Indian Head* than it was below. Nevertheless, the prejudice that Southwest suffered—and the harm to competition in the underground storage tank repair industry—is unmistakably clear. Joor simply glosses over not only the specific facts below but also the question they ultimately raise: Given the inherent potential for anticompetitive abuse, why should petitioning of a private standards-setting organization enjoy *Noerr-Pennington* immunity—especially when

competition is demonstrably harmed by the organization's rule-making process?

Other than this disagreement with Joor's presentation of the issues presented for review, Southwest believes that, in all respects save one, its petition is fully responsive to Joor's cross-petition.

B. Even Assuming That The *Noerr-Pennington* Doctrine Immunizes Joor's Petitioning Of The WFCA, The Sham And Co-Conspirator Exceptions To The Doctrine Were Satisfied

Like Joor, Southwest believes that the Ninth Circuit's application of the "sham" exception to the *Noerr-Pennington* doctrine incorrectly distinguishes between legislative and adjudicative action. Unlike Joor, and the Ninth Circuit below, Southwest believes that in the particular circumstances of this case, the sham exception encompasses misrepresentations made when pursuing "legislative" action. As pointed out in Southwest's petition, Joor submitted false information relating to the purported need to remove leaking tanks from the ground before repairing them. Southwest was not given an opportunity to rebut this misleading data. In this case, the sham exception was satisfied by the submission of false information. *Clipper Exxpress v. Rocky Mountain Motor Tariff Bureau, Inc.*, 690 F.2d 1240, 1260-61 (9th Cir. 1982), *cert. denied*, 459 U.S. 1227, 103 S. Ct. 1234 (1983); *Outboard Marine Corp. v. Pezetel*, 474 F. Supp. 168 (D. Del. 1979).

Southwest also believes that Joor's petitioning of the WFCA falls within the "co-conspirator" exception to the *Noerr-Pennington* doctrine. Below, Joor admitted it provided "hospitality and promotional gifts" to WFCA members. Southwest also introduced evidence that Joor

had extensively entertained members of the Los Angeles and San Diego Fire Departments. The fire department officials were responsible for issuing underground storage tank repair permits in Los Angeles and San Diego. (CR 53, Exhibits 21, 22.) In California, state law enjoins the receipt of consideration by an official in the course of pursuing his normal official duties. *See Byrne v. State Personnel Board*, 179 Cal. App. 2d 576, 4 Cal. Rptr. 32 (1960).

Besides the entertainment and gifts, there is other evidence demonstrating that Joor colluded with the WFCA and fire officials to inflict competitive harm on Southwest and on the tank lining industry. For example, a letter on WFCA stationery from WFCA employee R. V. Christoffersen to Joor president Howard Robbins says:

> Thank you for your letter with the comments on the Article 79 Subcommittee meeting. It has been copied and forwarded to the WFCA Uniform Fire Code Committee.
>
> I am looking forward to seeing you in March and *trust you will come loaded for bear.* The "*tank liners*" will be out in force and Forrest Ray won't be around to *help carry the battle.*

(CR 53, Exhibit 23) (emphasis added). The clear import of this letter is that the WFCA employee who authored it concerted with Robbins to combat and defeat the interests of Joor's competitors, the "tank liners", like Southwest.

Moreover, in a letter he wrote to Los Angeles Fire Department official John Hall concerning tank lining, Robbins implored: "[p]lease do not *expose me* any more than necessary." (CR 53, Exhibit 24.) This letter strongly

suggests that Robbins' contacts with fire officials and members of the WFCA needed to be kept secret in order to conceal the conspiracy against Southwest.

As the Ninth Circuit noted in *Clipper Exxpress*, "[c]onspiracy with a licensing authority to eliminate a competitor may also result in an antitrust transgression." 690 F.2d at 1252 n.17. Joor's actions below came within this co-conspirator exception to the *Noerr-Pennington* doctrine. *See also Harman v. Valley National Bank of Arizona,* 339 F.2d 564, 566 (9th Cir. 1964); *In re Airport Car Rental Antitrust Litigation,* 521 F. Supp. 568, 588 (N.D. Cal. 1981), *aff'd*, 693 F.2d 84 (9th Cir. 1982), *cert. denied sub nom. Budget Rent-A-Car of Washington-Oregon, Inc. v. Hertz Corp.*, 462 U.S. 1133, 103 S. Ct. 3114 (1983); *Affiliated Capital Corp. v. City of Houston,* 735 F.2d 1555 (5th Cir. 1984), *cert. denied sub nom. Gulf Coast Cable Television Co. v. Affiliated Capital Corp.*, 474 U.S. 1053, 106 S. Ct 788 (1986); *Miami International Realty Co. v. Town of Mt. Crested Butte,* 1984-2 Trade Cas. (CCH) ¶ 66,166 (D. Colo. 1984).

C. Conclusion

For the reasons set forth above and in its petition, Southwest respectfully requests that its petition be granted.

Dated: March 28, 1988.

Respectfully submitted,

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PROOF OF SERVICE BY MAIL

State of California

ss.

County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 11333 Iowa Avenue, Los Angeles, California 90025; that on March 28, 1988, I served the within *Petitioner's Reply to Cross-Petition* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

Clerk, United States
Supreme Court
One First Street, N.W.
Washington, D.C. 20543
(Original and forty copies)

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I declare under penalty of perjury that the foregoing is true and correct. Executed on March 28, 1988, at Los Angeles, California.

Siri Ved K. Khalsa
(Original signed)